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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SLADE LOHMAN,

Plaintiff and Respondent,

v.

JC EPHRAIM,

Defendant and Appellant.

B207755

(Los Angeles County
Super. Ct. No. BC343601)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joanne O'Donnell, Judge. Affirmed in part and reversed in part.

Law Office of Bruce Adelstein, Bruce Adelstein; Law Offices of Alana B. Anaya and Alana B. Anaya for Defendant and Appellant.

Kurt Stiefler for Plaintiff and Respondent

In May 2004 Charity McCrary entered into a written agreement with Slade Lohman for the sale of residential property. McCrary agreed to deliver the property vacant by close of escrow on July 15, 2004. She was unable to fulfill this obligation because tenants residing on the property successfully resisted eviction for almost four years, until February 2008. In September 2004, McCrary entered into an agreement with JC Ephraim in which he gave her a loan secured by the property. In September 2005, more than a year after escrow was to have closed but long before McCrary could perform her obligation to deliver the property vacant, McCrary deeded the property to Ephraim in lieu of his foreclosure on the loan.

Lohman sued Ephraim, ultimately asserting causes of action for quiet title, interference with contract, intentional and negligent interference with prospective economic advantage, fraud, cancellation of instrument and ejectment. After a court trial, judgment was entered in favor of Lohman on the causes of action for interference with contract and prospective economic advantage and in favor of Ephraim on all other causes of action.

Ephraim appeals, contending he did not interfere with Lohman's contractual relations or prospective economic advantage. We affirm as to the cause of action for interference with contract and reverse as to the causes of action for intentional and negligent interference with prospective economic advantage.

FACTUAL AND PROCEDURAL BACKGROUND

McCrary owned residential property at 10324 and 10326 Mount Gleason Avenue, in Tujunga. Her brother and at least one member of his family (hereafter tenants) resided on the property. The property was encumbered by two mortgages, the balances of which totaled approximately $256,000.

Lohman and his partner agreed to buy the property for $356,000 and to advance McCrary $5,000 upon her execution of the purchase agreement and another $5,000 upon her institution of eviction proceedings against the tenants, the funds to be secured in the property. (Because Lohman ultimately bought out his partner's interest in the transaction, we hereafter refer only to him as the purchaser.) Lohman agreed to advance an additional $15,000 to McCrary upon successful eviction of the tenants. All advances were to be deposited into escrow and released by the escrow company to Lohman.

McCrary was required to render the property vacant at least five days prior to close of escrow and deliver title by close of escrow. The purchase agreement provided that "CLOSE OF ESCROW shall occur on July 15, 2004." It also provided that "[t]ime is of the essence." Lohman and McCrary assumed eviction of the tenants would be effected before July 15, 2004.

After eviction of the tenants and final inspection, escrow would close and title would be recorded in Lohman's name. Lohman and McCrary agreed the balance of the purchase price would "not be held by escrow," but would be paid to McCrary "after property has been rehabbed and resold by buyer to a third party," i.e., at some indeterminate time after escrow closed. Escrow fees were to be split "50%/50%."

After McCrary executed the purchase agreement and instituted eviction proceedings against the tenants, Lohman deposited $10,000 into escrow. McCrary executed a note and deed of trust and withdrew the funds from escrow on June 4. On July 8, 2004, Lohman agreed to advance McCrary an additional $10,000, again secured by the property, in exchange for a $20,000 reduction in the purchase price. Lohman deposited the funds into escrow and McCrary withdrew them, executing a second note and deed of trust. Both notes provided that McCrary would make monthly payments of $250 each for one year, at which time the total balance would become due. If purchase escrow closed as agreed, no interest would be due. If it did not, 12 percent interest would be charged.

Because the tenants successfully resisted eviction until February 2008, McCrary did not, within the relevant time frame, render the property vacant or deliver title into escrow, Lohman did not make the eviction-dependent deposit, and escrow never closed.

By September 2004, McCrary's financial affairs were in disarray. Ephraim stepped in to help. He accepted limited power of attorney, took control of McCrary's finances, and attempted to buy out Lohman's interest in the Mt. Gleason property. With his partners, Ephraim gave McCrary a $230,000 line of credit, securing the promissory note with a trust deed on the property, which he recorded. (Because the partners received defense verdicts and are not part of this appeal, we hereafter refer only to Ephraim as the interfering party.)

In May and June 2005, Ephraim funded McCrary's repayment of the advances Lohman had made, with interest. Lohman returned $20,000 of the repayment to escrow, where it remained as of the day of trial in February 2008.

By September 2005, McCrary had defaulted on the line of credit Ephraim had extended to her. Ephraim threatened to foreclose on the property but ultimately accepted a grant deed to the property in lieu of foreclosure. He recorded the deed. McCrary never attempted to cancel or terminate the purchase agreement.

Lohman filed his complaint on November 28, 2005 and later filed a first amended complaint, asserting causes of action for, among other things, intentional interference with contract and intentional and negligent interference with prospective economic advantage. Lohman alleged Ephraim recorded a deed on the property though he knew the property was the subject of a purchase agreement with Lohman. He also alleged that the $230,000 loan Ephraim made to McCrary was "fictitious and done to interfere with [Lohman's] contract and real property interest." No other misconduct by Ephraim was alleged.

At trial, Lohman presented evidence of the purchase agreement and the circumstances of Ephraim's interference. He presented evidence that Ephraim's efforts did not help McCrary, that he induced her to buy his father's property, and that the $230,000 line of credit was illusory. He presented evidence to the effect that a title document on Ephraim's father's property had been forged and speculated that Ephraim benefitted by and would have been in a position to commit the forgery.

The court granted judgment in favor of Lohman on the causes of action for interference with contract and with prospective economic advantage, finding Ephraim interfered with the purchase agreement in September 2004 by agreeing to accept a security interest in property McCrary had previously agreed to sell to Lohman. The court made no finding regarding any improper conduct by Ephraim other than his interference with the contract. Lohman was awarded damages in the amount of the appraised value of the property as of September 2004, $550,000, less the $336,000 purchase price, for a total of $214,000.

DISCUSSION

Ephraim's principal contention on appeal is that after July 15, 2004, no enforceable contract existed between McCrary and Lohman because expiration of the escrow deadline invalidated the purchase agreement. He also argues Lohman repudiated the purchase agreement before September 2005 and that McCrary's breach of the agreement caused no damages. None of the arguments has merit.

I. Standard of Review

"'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted.) If a statement of decision does not resolve a controverted issue and the omission was not brought to the trial court's attention, we will imply findings to support the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.) We review issues of contract interpretation de novo unless there is an issue on which extrinsic evidence was properly admitted and there is a conflict in that evidence, in which case we review the trial court's interpretation under the substantial evidence standard. (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865-866 & fn. 2.) We review the trial court's conclusions of law de novo. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

II. Intentional Interference With a Contractual Relationship

"[T]he exchange of promises resulting in . . . a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement." (*Della Penna v. Toyota Motor Sales, U.S.A.* (1995) 11 Cal.4th 376, 392.) "Economic relationships short of contractual, however, . . . stand on a different legal footing as far as the potential for tort liability is reckoned. Because ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties." (*Ibid*.) Accordingly, "a greater solicitude" is brought "to those relationships that have ripened into agreements," a lesser to "commercial relations *less* than contractual." (*Ibid*.) "Thus, while intentionally interfering with an existing contract is 'a wrong in and of itself' [citation], intentionally interfering with a plaintiff's prospective economic advantage is not. To establish a claim for interference with prospective economic advantage, therefore, a plaintiff must plead that the defendant engaged in an independently wrongful act. [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1158.)

To establish intentional interference with an existing contract a plaintiff must allege and prove: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric v. Bear Stearns & Co*. (1990) 50 Cal.3d 1118, 1126.) But a cause of action for interference with contract will lie only where the contract is enforceable. (*PMC, Inc. v. Saban Entertainment, Inc*. (1996) 45 Cal.App.4th 579, 601.) "If a party is not obligated to perform a contract and may refuse to do so at his election without penalty, then the other party to that agreement enjoys nothing more than an expectancy. A stranger intentionally interfering with that relationship quite obviously does not disturb an enforceable contract but only a *prospective* economic relationship." (*Id*. at pp. 599-600.)

A contract is enforceable if the law affords the promisee some remedy for the promisor's failure to perform. Enforcement may take the form of an award of damages or an order that the contract be specifically performed. (Rest. 2d Contracts, § 345, com. b.) A contract for the sale of real property is enforceable where one party fully performs within the prescribed time but the other party does not. "[U]nder those circumstances, the party who has performed or tendered performance may have specific performance or be able to recover damages from the nonperforming party." (6 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 6:20, p. 45 (6 Miller & Starr).)

"A cause of action for breach of contract requires pleading of a contract, plaintiff's performance or excuse for failure to perform, defendant's breach and damage to plaintiff resulting therefrom." (*McKell v. Washington Mutual, Inc*. (2006) 142 Cal.App.4th 1457, 1489.) A defendant who urges that the contract is unenforceable because her failure to perform is excused bears the burden of establishing the defense. A defendant in an action for interference with contract bears the similar burden of demonstrating why the underlying contract is unenforceable.

a. The escrow deadline was not precedent to McCrary's performance

Ephraim first argues the purchase agreement between Lohman and McCrary was unenforceable due to the failure of a condition precedent: close of escrow by July 15, 2004. The argument is meritless.

"[A] condition precedent is either an act of a party that must be performed or an uncertain event that must happen before [a] contractual right accrues or the contractual duty arises. [Citations.]" (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313; Civ. Code, § 1436.) "[P]rovisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction." (*Rubin v. Fuchs* (1969) 1 Cal.3d 50, 53.) Neither Lohman nor McCrary expressly agreed that any right or duty be conditioned upon escrow closing on July 15, 2004 and the contract does not require such a construction.

"Escrow" is a transaction in which one person delivers "any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to" another person for the purpose of effecting a sale or transfer. (Fin. Code, § 17003.) "An instrument is 'deposited in escrow' when in accordance with an agreement to that effect it is deposited with a third person to be delivered to the other party to the agreement on the performance of a specified condition [citations].” (*Sousa v. First California Co*. (1950) 101 Cal.App.2d 533, 538-539.) An escrow deadline is not a condition of either party’s duty to perform—those duties are set forth in the purchase agreement. The deadline is simply the time by which performance must occur. (6 Miller & Starr, *supra*, § 6:19, p. 42 [“Escrow instructions usually provide that their terms and conditions must be performed within a certain limited time. In general, the parties must perform or satisfy the conditions within the time specified, or within any agreed extension of time.”]; see *RC Royal Development and Realty Corp. v. Standard Pacific Corp.* (2009) 177 Cal.App.4th 1410, 1422 [provision that a commission shall be paid “through escrow at closing” does not condition the obligation to pay the commission on the close of escrow]; *Steve Schmidt & Co. v. Berry* (1986) 183 Cal.App.3d 1299, 1309-1310 [provision stating that owner would pay a commission to agent “at the close of escrow” “does not set forth a condition for entitlement to a commission but a limitation on the time of payment”].)

Under the purchase agreement, McCrary was obliged to deposit title into escrow once Lohman made certain deposits. The escrow deadline set forth the last date by which her performance was due. The deadline could not logically be a precedent condition. Ephraim essentially argues that the escrow deadline was part of McCrary’s duty to perform, i.e., that she was required to deposit title by that date or not at all. This construction finds no support in the purchase agreement. McCrary’s duty was simply to deliver title to vacant property by a certain date.

b. There was no mutual mistake of fact

Ephraim argues the purchase agreement was voidable because the parties to it labored under a mutual mistake of fact—that the tenants could be evicted within a short time. It is undisputed the parties labored under the mistaken belief that the tenants could be evicted quickly, but the failed prediction does not constitute a mistake of fact sufficient to void the purchase agreement.

A contract may be voidable where consent is obtained through mistake. (Civ. Code, §§ 1566, 1567.) A mistake of fact consists in "[a]n unconscious ignorance . . . of a fact . . . material to the contract . . . ." (Civ. Code, § 1577.) "[A] mutual mistake . . . which affects an essential element of the contract and is harmful to one of the parties is subject to rescission by the party harmed." (*Guthrie v. Times-Mirror Co*. (1975) 51 Cal.App.3d 879, 884.) "'[M]ere ignorance of the facts is not necessarily a ground for relief, nor will the courts relieve one from the consequences of his own improvidence or poor judgment. Parties must exercise ordinary diligence in the execution of contracts and are chargeable with such knowledge as diligence would have disclosed, and may not avoid a contract on the basis of mistake where it appears that ignorance of the facts was the result of carelessness, indifference, or inattention . . . .'" (*Moreno Mutual Irrigation Co. v. Beaumont Irrigation Dist.* (1949) 94 Cal.App.2d 766, 782, citation omitted; see, e.g., *Mosher v. Mayacamas Corp*. (1989) 215 Cal.App.3d 1, 6 [faulty prediction was an error in judgment rather than a mistake of fact].) To rescind on the basis of mutual mistake, the rescinding party must show she was injured by the alleged mistake. (*Guthrie v. Times-Mirror Co*., *supra*, 51 Cal.App.3d at p. 884.)

Though McCrary mistakenly thought the tenants could be evicted quickly, Ephraim presented no evidence that she exercised reasonable diligence before making this prediction. Her failed prediction is therefore not sufficient to avoid the contract. Even if the parties' failed prediction were a mistake of fact, the mistake in no way injured McCrary. On the contrary, it enabled her to find a buyer who otherwise might have shunned the transaction, and to obtain a $20,000 advance from him. She therefore had no ground for rescission and the contract was not rendered unenforceable by her mistake.

c. The doctrines of impracticability and frustration do not apply

Ephraim next argues the purchase agreement was unenforceable because McCrary's performance was discharged under the doctrines of impracticability (Rest. 2d Contracts, § 261) and supervening frustration (Rest. 2d Contracts, § 265). He argues McCrary's performance was made impracticable, and her principal purpose was substantially frustrated, by the tenants' immovability. Neither doctrine applies.

The duty to perform an obligation under a contract may be discharged where performance is made impracticable by the non-occurrence of an event that the parties assumed would occur. (Rest. 2d Contracts, § 261.) When the obstacle to performance is only temporary, the duty to perform is not discharged but merely suspended until cessation of the impracticability. Temporary impracticability discharges the duty to perform only where performance after cessation of the impracticability "would be materially more burdensome than had there been no impracticability . . . ." (Rest. 2d Contracts, § 269.) Here, McCrary's performance after the tenants were evicted was not made materially more burdensome than had there been no tenant holdover—she had only to deliver title to the property. Because her temporary inability to evict the tenants suspended but did not discharge her duty to deliver vacant property, the purchase agreement remained enforceable.

Performance may also be excused where "a party's principal purpose is substantially frustrated . . . by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made . . . ." (Rest. 2d Contracts, § 265.) The doctrine of discharge by supervening frustration "deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract. It is distinct from the problem of impracticability . . . ." (Rest. 2d Contracts, § 265, com. a.) The classic example is where a person agrees to pay for the use of a second floor window from which he intends to watch a parade, but refuses to pay when he learns the parade has been canceled. His duty to pay is discharged under the doctrine of supervening frustration. (Rest. 2d Contracts, § 265, illus. a.) The doctrine has no application here because no evidence suggests the four-year delay caused by the tenants' immovability rendered Lohman's performance—payment of the remainder of the purchase price—virtually worthless to McCrary. True, McCrary needed money quickly. But she agreed to accept only $25,000 (later $35,000) quickly, and was content to wait an indefinite period of time—until Lohman rehabilitated and resold the property—to be paid the remainder of the purchase price. No evidence suggests a belated sale would have been virtually worthless to her.

d. Lohman did not repudiate the purchase agreement

Ephraim argues Lohman repudiated the purchase agreement "by foreclosing on the loans" and demanding repayment with interest, in May and June 2005. Ephraim misapprehends the nature and effect of the $20,000 in advances. The purchase agreement described the two $10,000 payments as "deposit[s]" into escrow that were "release[d]" to McCrary. Lohman treated them as advances funded by the deposits, returning McCrary's repayments to escrow in 2005 and leaving them there until trial in 2008. He did not "foreclose" on anything and did not treat the money as a loan coming from him. The trial court thus had substantial evidence from which to conclude that Lohman's taking interest upon temporarily released deposits did not constitute a repudiation of the purchase agreement.

e. Time was not of the essence

The subtext of each of Ephraim's arguments against enforcement of the purchase agreement was that the passage of time alone sufficed to render the agreement unenforceable, especially given that the contract provided that time was of the essence. The argument is meritless in two respects.

First, including "time is of the essence" in a document "does not necessarily require a court to conclude that the buyer's rights would be so . . . limited" where subsequent conduct and the bargain itself do not contemplate time will be of the essence. (*Nash v. Superior Court* (1978) 86 Cal.App.3d 690, 696; see *Stratton v. Tejani* (1982) 139 Cal.App.3d 204, 211; *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1038 ["where the subsequent conduct of parties is inconsistent with and clearly contrary to provisions of the written agreement, the parties' modification setting aside the written provisions will be implied"].)

Here, the bargain did not contemplate time was of the essence. Though the parties agreed escrow would close by July 15, 2004, close of escrow would not directly or immediately benefit McCrary. The advances she agreed to accept could logically be paid only before escrow closed, when she (1) executed the purchase agreement, (2) instituted eviction proceedings, and (3) completed the eviction. The only other payment she agreed to accept—the remainder of the purchase price—could be paid only a substantial time after escrow closed, when Lohman rehabilitated and resold the property. If anything, then, the agreement indicates time was not of the essence.

Moreover McCrary's and Lohman's actions indicate time was not of the essence. In the two months between July 2004, when escrow was to have closed, and September 2004, when Ephraim obtained a security interest in the property, McCrary never attempted to cancel or terminate the contract. On the contrary, she kept the $20,000 Lohman had advanced to her until June and July 2005. And Lohman at all times acted as if escrow was ongoing, re-depositing $20,000 in June 2005 and leaving it there up to the day of trial in February 2008.

Even if time had been of the essence, by failing to cancel the contract and retaining the advances for a year, McCrary waived the time limitation. "Like any other contractual terms, timeliness provisions are subject to waiver by the party for whose benefit they are made. [Fn. omitted.] [Citation.]" (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1339.)

Neither can we say that the passage of time between July and September 2004 was unreasonable as a matter of law, as the parties apparently were content to continue their contractual relationship beyond the escrow deadline, until the time Lohman rehabilitated and resold the property. Even if it was unreasonable, no evidence suggests the passage of time rendered the purchase agreement unenforceable. A buyer who has fully performed all the terms of a purchase agreement may elect certain remedies against a seller who has not, including damages and specific performance. (6 Miller & Starr, *supra*, § 6:20, p. 45.) Though it is arguable, given the continued presence of tenants on the property, that Lohman could not have had specific performance in September 2004 (or September 2005, when McCrary deeded the property to Ephraim), at a minimum he was entitled to damages, if only in the amount of McCrary's share of the escrow costs. He might also have been entitled to other contractual or consequential damages, depending on McCrary's diligence in evicting the tenants or her precontractual representations regarding them. The contract was therefore enforceable when Ephraim interfered with it.

f. Conclusion

We find substantial evidence supports the trial court's finding that Ephraim intentionally interfered with Lohman's enforceable contract with McCrary.

III. Interference With a Prospective Economic Advantage

Ephraim contends the trial court erred in finding he interfered with Lohman's prospective economic advantage because no evidence suggested he engaged in any wrongful conduct independent of the interference. We agree.

As stated, to recover for alleged interference with prospective economic relations a plaintiff must show that the defendant's interference was wrongful by some measure beyond the fact of the interference itself. "An act is not independently wrongful merely because defendant acted with an improper motive. . . . [A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. [Citations.]" (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, (2003) 29 Cal.4th at p. 1159, fn. omitted.)

Lohman did not allege in his complaint any fact constituting wrongful conduct by Ephraim beyond his interference with contract. And at the close of trial, though the court instructed Lohman's counsel to "walk through the elements of each cause of action" in his closing argument, he made no mention of any pertinent wrongful conduct. In opposition to this appeal, Lohman continues to neglect the issue.

An independent review of the record reveals no pertinent wrongdoing by Ephraim. Lohman attempted to show that Ephraim victimized McCrary. He presented evidence that she was deeper in debt after Ephraim stepped in to help her than she was before, that she had been induced to buy Ephraim's father's property, and that much of the $230,000 line of credit was illusory. (It is undisputed some of the credit line was used to pay back the advances, i.e., $20,000.) Lohman presented evidence to the effect that a title document on Ephraim's father's property had been forged and speculated that Ephraim himself would have been in a position to commit the forgery. None of this indicated Ephraim interfered with Lohman's contract by wrongful means. Ephraim interfered either by accepting a security interest in pre-obligated property or by accepting title to the property in lieu of foreclosure on a debt. No evidence suggests *no* debt existed. No evidence ties Ephraim's father's property to the interference. The judgment against Ephraim for interference with McCrary's prospective economic advantage is therefore unsupported by substantial evidence.

DISPOSITION

The judgment is affirmed as to Lohman's cause of action for interference with contract and reversed as to his causes of action for intentional and negligent interference with prospective economic advantage. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, J.

I concur:

JOHNSON, J.

ROTHSCHILD, Acting P. J., Concurring and Dissenting:

I concur in the majority's conclusion that the judgment against Ephraim on the claim for interference with prospective economic advantage is not supported by substantial evidence. I write separately because I disagree with the majority's affirmance of the judgment on the claim for interference with contract. In my view, the judgment on that claim too is not supported by substantial evidence and should be reversed.

As the majority acknowledges, the contract between McCrary and Lohman required McCrary to deliver the property vacant. McCrary began her attempts to evict the tenants in 2004, but those attempts did not succeed until February 2008. It is consequently undisputed that *even if McCrary had retained ownership of the property rather than deeding it to Ephraim*, she would still have been unable to perform until February 2008. Moreover, it is undisputed that neither McCrary nor Ephraim was at fault for McCrary's inability to perform—Lohman does not contend, let alone cite evidence, that McCrary was insufficiently diligent in trying to evict the tenants, or that Ephraim in any way interfered with McCrary's eviction efforts.

Given that McCrary was blamelessly unable to perform from 2004 through 2007 (even if she had not deeded the property to Ephraim), her failure to perform during that time cannot have constituted a breach of the contract. (*Maudlin v. Pacific Decision Sciences Corp.* (2006) 137 Cal.App.4th 1001, 1017.) And because Ephraim too was not to blame for (1) the tenants' failure to vacate the property and (2) McCrary's consequent inability to perform through 2007, Ephraim cannot have induced McCrary to breach the contract at any point during that time.

The earliest that McCrary could have performed was in February 2008, when she finally succeeded in evicting the tenants. Thus, the only theory that could possibly support the judgment would be that by making the $230,000 loan *in 2004* and taking title to the property *in 2005*, Ephraim induced McCrary to breach *in 2008*. That theory too fails, however, because by February 2008 the passage of time had rendered the contract unenforceable.

The contract called for escrow to close by July 15, 2004. Although the failure of escrow to close by that date might not, in itself, render the contract unenforceable, the contract must be read as implicitly providing that if escrow did not close *within a reasonable time thereafter*, then the contract would become unenforceable. Lohman's counsel expressly conceded the point at oral argument but contended that the almost four-year delay, from July 2004 to February 2008, was reasonable. That cannot be correct, particularly in the context of real estate transactions in which property values can fluctuate dramatically over a four-year period.

In sum, McCrary could not have performed (and hence could not have breached or been induced to breach) until February 2008. But by February 2008, the contract was no longer enforceable because it had failed to close within a reasonable time after the scheduled closing date.

The majority opinion contains just one paragraph that, to some extent, addresses the foregoing analysis. The majority states that "[t]hough it is arguable, given the continued presence of tenants on the property, that Lohman could not have had specific performance in September 2004 (or September 2005,when McCrary deeded the property to Ephraim), at a minimum he was entitled to damages, if only in the amount of McCrary's share of the escrow costs." (Maj. opn. *ante*, at p. 13.) The statement conflicts with the undisputed facts and law in two respects. First, it is not merely arguable that Lohman could not have obtained specific performance in September 2004 or September 2005—the undisputed facts show that it was then impossible for McCrary to perform, and it was unclear whether she would ever be able to perform. It is therefore undisputed that, even if McCrary had not deeded the property to Ephraim, Lohman could not have obtained specific performance at any time before February 2008. Second, Lohman likewise could not have recovered damages in September 2004 or September 2005, because McCrary had not then breached—it was impossible for her to perform, so her failure to perform did not constitute a breach of the contract. Damages are recoverable only for a *breach*, not for an *excused nonperformance*.

The majority continues: "[Lohman] might also have been entitled to other contractual or consequential damages, depending on McCrary's diligence in evicting the tenants or her precontractual representations regarding them." (Maj. opn. *ante*, at p. 13.) Again, the statement is at odds with the record. Ephraim does not even *contend*, let alone cite *evidence*, that McCrary was insufficiently diligent in attempting to evict the tenants, or that she made any misleading "precontractual representations regarding them."

The majority also points out that McCrary has "never attempted to cancel or terminate the purchase agreement" (Maj. opn. *ante*, at p. 4), but in this context McCrary's failure to cancel the contract is of no significance. The scheduled closing date was July 15, 2004. Ephraim took title to the property in September 2005. Lohman filed suit *against Ephraim* in November 2005. Since then, McCrary has had no reason to cancel, affirm, or otherwise pay any attention to the contract—Lohman did not sue her to enforce it, and she is no longer the owner of the property. Lohman's failure to cancel the contract is likewise of no moment. Because Lohman sued Ephraim for interference with contract, Lohman had no choice but to contend that the contract is enforceable. It does not follow that the contention is correct.

I need not address any other parts of the majority's reasoning because the foregoing analysis independently requires that the judgment on the interference with contract claim be reversed. For reasons that have nothing to do with Ephraim, McCrary was blamelessly unable to perform until February 2008, and by then the contract was unenforceable because the transaction had not closed within a reasonable time after the closing date specified in the contract. I therefore dissent from the majority's affirmance of the judgment on the claim for interference with contract.

ROTHSCHILD, Acting P. J.